

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BARRY LONG,

Plaintiff,

v.

LIVE NATION WORLDWIDE, INC.;
and TICKETMASTER LLC,

Defendants.

C16-1961 TSZ

ORDER

THIS MATTER comes before the Court on defendants' motion to dismiss or to stay and compel arbitration, docket no. 27. Having reviewed all papers filed in support of, and in opposition to, defendants' motion, the Court enters the following Order.

Background

Plaintiff Barry Long brings this action against defendants Ticketmaster LLC and its parent company, Live Nation Worldwide, Inc., under the Americans with Disability Act ("ADA") and Washington's Law Against Discrimination ("WLAD"). Plaintiff alleges that Ticketmaster operates a website, www.ticketexchangebyticketmaster.com, through which tickets for National Football League ("NFL") games are resold. *See* Am. Compl. at ¶ 1.2 (docket no. 16). Plaintiff further asserts that, in attempting to purchase

1 tickets to a Seattle Seahawks game at CenturyLink Field on the secondary (or fan-to-fan)
2 market, he encountered barriers while using the website at issue, including the website's
3 failure to provide information about wheelchair-accessible seating that complies with the
4 Department of Justice's 2010 ADA Standards. See id. at ¶¶ 4.5-4.10; see also 28 C.F.R.
5 §§ 35.138 & 36.302. Plaintiff made no purchase via [www.ticketexchangebyticketmaster](http://www.ticketexchangebyticketmaster.com)
6 .com, and was not prompted to "click" on the link to, review, or consent to, the website's
7 Terms and Conditions. In moving to dismiss or stay and compel arbitration, defendants
8 explicitly disclaim any reliance on the Terms and Conditions or "browsewrap" agreement
9 on the ticket exchange website. See Defs.' Reply at 7-8 (docket no. 31).

10 Instead, defendants contend that plaintiff is required to arbitrate his ADA and
11 WLAD claims relating to the ticket exchange website because he previously used a
12 different website maintained by Ticketmaster, namely www.ticketmaster.com, via which
13 he became bound by a "clickwrap" agreement in connection with his purchases of tickets
14 for several music concerts and baseball games between June 6, 2012, and April 9, 2017.
15 See Defs.' Motion at 2-7 (docket no. 27); Ex. G to Tobias Decl. (docket no. 27-8). From
16 January 27 to October 31, 2012, the Terms of Use on the Ticketmaster website provided
17 as follows:

18 Live Nation and you agree to arbitrate all disputes and claims between us.
19 This agreement to arbitrate is intended to be broadly interpreted. It
includes, but is not limited to:

- 20 • claims arising out of or relating to any aspect of the relationship
21 between us, whether based in contract, tort, statute, fraud,
22 misrepresentation or any other legal theory, including, without
23 limitation, claims relating to your use of Live Nation's website
www.livenation.com, or Ticketmaster's website www.ticketmaster.com,

as the case may be (collectively, the “Websites”), any statements or advertising on the Websites, your purchase of tickets through the Websites, any fees or other amounts you paid to Live Nation in connection with the purchase of tickets through the Websites, and/or the delivery of tickets to you that you purchased through the Websites;

- claims that arose before this or any prior Agreement (including, but not limited to, claims relating to advertising);
- claims that are currently the subject of purported class action litigation in which you are not a member of a certified class; and
- claims that may arise after the termination of this Agreement.

Tobias Decl. at ¶ 10 & Ex. H (docket nos. 27-1 & 27-9). From November 1, 2012, to the present, the arbitration provision of the “clickwrap” agreement remained virtually the same, reading in relevant part:

Any dispute or claim relating in any way to your use of the Site, or to products or services sold or distributed by us or through us, will be resolved by binding arbitration rather than in court, with the following exceptions:

- You may assert claims in small claims court if your claims apply;
- If a claim involves the conditional license granted to you as described in the Ownership of Content and Grant of Conditional License section above, either of us may file a lawsuit in a federal or state court located within Los Angeles County, California, and we both consent to the jurisdiction of those courts for such purposes; and
- In the event that the arbitration agreement in these Terms is for any reason held to be unenforceable, any litigation against us (except for small-claims court actions) may be commenced only in a federal or state court located within Los Angeles County, California, and we both consent to the jurisdiction of those courts for such purposes.

Id. at ¶¶ 2, 11-15 & Exs. A, I-M (docket nos. 27-1 – 27-2 & 27-10 – 27-14). The term “Site” is defined as “the Ticketmaster sites and applications where this [*i.e.*, the Terms of Use] appears.” *Id.* The Terms of Use associated with the Ticketmaster website are different from the Terms and Conditions that appear on the NFL ticket exchange website.

1 See Ex. A to Carney Decl. (docket no. 30-1). Thus, for purposes of the arbitration
2 provision in the Terms of Use on the Ticketmaster website, the term “Site” does not refer
3 to the NFL ticket exchange website.

4 **Discussion**

5 Plaintiff does not dispute that he is bound by the arbitration agreement set forth in
6 the Terms of Use related to the Ticketmaster website, but he argues that such arbitration
7 agreement does not apply to the ADA and WLAD claims asserted in this action. He is
8 correct. Under the Federal Arbitration Act, a written arbitration agreement in “a contract
9 evidencing a transaction involving commerce” is “valid, irrevocable, and enforceable,
10 save upon such grounds as exist at law or in equity for the revocation of any contract.”
11 9 U.S.C. § 2. In determining whether to compel arbitration, the Court must assess
12 (i) whether the parties’ contract, if any, evidences a transaction involving commerce;
13 (ii) whether the parties’ contract, if any, contains a valid arbitration provision; and
14 (iii) whether any arbitration agreement encompasses the dispute at issue. See Boardman
15 v. Pac. Seafood Group, 822 F.3d 1011, 1017-18 (9th Cir. 2016). Arbitration is a matter
16 of contract, and a party cannot be required to submit to arbitration any dispute that he or
17 she did not agree to arbitrate. Id. at 1019.

18 Defendants seem to concede that, because plaintiff did not make any purchase
19 through the website at issue, the Terms and Conditions on the NFL ticket exchange
20 website cannot be viewed as a contract evidencing a transaction involving commerce.
21 Thus, the Court need not engage in further analysis concerning the arbitration clause in
22 the Terms and Conditions of the NFL ticket exchange website, and to the extent that the
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1 arbitration provisions in the prior and current Terms of Use on the Ticketmaster website
2 do not encompass the present dispute between the parties, the Court cannot compel
3 plaintiff to arbitrate his ADA and WLAD claims.

4 In construing the Terms of Use on the Ticketmaster website, the Court must look
5 to the contract-interpretation principles developed under state law, while giving due
6 regard to the federal policy favoring arbitration. See id. at 1018. Washington courts
7 follow the “objective manifestation” theory of contracts. Hearst Commc’ns, Inc. v.
8 Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Under this approach, the
9 focus is on “the objective manifestations of the agreement, rather than on the unexpressed
10 subjective intent of the parties.” Id. Words in a contract are assigned their reasonable,
11 “ordinary, usual, and popular” meaning unless the agreement “clearly demonstrates a
12 contrary intent.” Id. at 503-04. If the parties’ intent can be divined from the actual words
13 within the four corners of the document, extrinsic evidence will not be considered. See
14 id. at 503-04; see also id. at 504 (Washington courts “do not interpret what was intended
15 to be written but what was written” (clarifying the holding of Berg v. Hudesman, 115
16 Wn.2d 657, 801 P.2d 222 (1990))).

17 Since November 1, 2012, the arbitration provision set forth in the Terms of Use on
18 the Ticketmaster website has applied only to disputes or claims “relating in any way to
19 your use of the Site, or to products or services sold or distributed by us or through us.”
20 Exs. A & I-M to Tobias Decl. (docket nos. 27-2 & 27-10 – 27-14). Plaintiff’s ADA and
21 WLAD claims do not relate to plaintiff’s use of the “Site,” which does not, by definition,
22 include www.ticketexchangebyticketmaster.com, or to any products or services sold or
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1 distributed by or through defendants. Thus, contrary to defendants’ assertion, the Terms
2 of Use in effect since November 1, 2012, do not require plaintiff to arbitrate the claims
3 pleaded in this litigation.

4 Between January 27, 2012, and October 31, 2012, the arbitration clause was not
5 itself as limited as the current provision, stating simply that the parties “agree to arbitrate
6 all disputes and claims between us.” See Ex. H to Tobias Decl. (docket no. 27-9 at 7).
7 At the time, however, the Terms of Use governed only “the use of ticketmaster.com and
8 mobile versions thereof,” which apparently contained “sections” where tickets could be
9 resold or purchased on the secondary market. See id. (docket no. 27-9 at 2). This scope
10 was reiterated in the arbitration provision, which set forth as examples of covered
11 disputes “claims relating to your use of Live Nation’s website www.livenation.com, or
12 Ticketmaster’s website www.ticketmaster.com.” See id. (docket no. 27-9 at 7).
13 Defendants make no assertion that plaintiff used “sections” of www.ticketmaster.com,
14 www.livenation.com, or any mobile versions to attempt to buy Seattle Seahawks tickets.
15 The website now at issue, www.ticketexchangebyticketmaster.com, is not mentioned in
16 the arbitration agreement, and it seems not to have existed during the period that the
17 2012 Terms of Use were in effect. Plaintiff will not be deemed to have agreed to
18 arbitrate claims relating to his use of a website before the website was even created.

19 Defendants’ reliance on Nevarez v. Forty Niners Football Company, LLC, 2017
20 WL 3492110 (N.D. Cal. Aug. 15, 2017), is misplaced. Unlike in the case before the
21 Court, in Nevarez, the plaintiffs used the Ticketmaster website to purchase tickets and
22 parking passes for events at Levi’s Stadium in Santa Clara, California, the home field for
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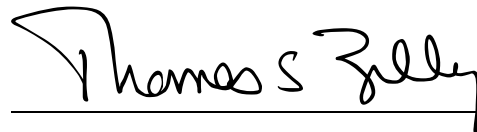
1 the NFL team known as the San Francisco Forty Niners. *Id.* at *1. The plaintiffs in
2 Nevarez created Ticketmaster accounts, logged into their accounts, and bought tickets
3 and parking passes. *Id.* at *1-*3 & n.1. At each step, plaintiffs were required to assent to
4 the Terms of Use, which included an arbitration provision. *Id.* at *2-*3. Nevarez does
5 not support defendants' view that a "clickwrap" agreement, which binds a party with
6 respect to transactions on the associated website, also requires such party to arbitrate
7 grievances concerning an entirely different website through which no purchase was
8 made. Defendants have cited no authority in which a "clickwrap" or "browsewrap"
9 agreement has been extended beyond the transaction or website use that itself gave rise to
10 the agreement.¹

11 **Conclusion**

12 For the foregoing reasons, defendants' motion to dismiss or to stay and compel
13 arbitration, docket no. 27, is DENIED.

14 IT IS SO ORDERED.

15 Dated this 8th day of November, 2017.

16 

17 Thomas S. Zilly
18 United States District Judge

19 ¹ Defendants' argument that the arbitrator, not the Court, should decide whether the dispute at issue must
20 be arbitrated also lacks merit. Whether the parties agreed to arbitrate arbitrability is a question for the
21 Court unless the parties "clearly and unmistakably" provided otherwise. *See AT&T Techns., Inc. v.*
22 *Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130
23 (9th Cir. 2015). Because the Terms of Use on the Ticketmaster website are not binding on plaintiff, any
clause therein delegating arbitrability to the arbitrator does not constitute the "clear and unmistakable"
evidence required to remove the issue of arbitrability from the Court's purview.